



## **U.S. MERIT SYSTEMS PROTECTION BOARD**

### **Case Report for July 14, 2023**

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### **BOARD DECISIONS**

**Respondent:** Michael L. Levinson  
**Agency:** Social Security Administration  
**Decision Number:** [2023 MSPB 20](#)  
**Docket Number:** CB-7521-17-0023-T-1  
**Issuance Date:** July 12, 2023

#### **ACTIONS AGAINST ALJs CONSTITUTIONAL ISSUES PENALTY**

The petitioner agency filed a complaint charging the respondent, an Administrative Law Judge (ALJ), with (1) neglect of duties, (2) failure to follow a directive, and (3) conduct unbecoming an ALJ. The petitioner sought from the Board a determination that good cause existed for the petitioner's intent (1) to suspend the respondent from the date of the complaint through the date of the Board's final decision and (2) to remove him from service. The ALJ assigned to adjudicate the matter issued an initial decision finding that the petitioner proved all three of the charges and denying the respondent's affirmative defenses and other challenges. The presiding ALJ concluded that there was good cause to discipline the respondent; however, he found that the appropriate penalty was a 2-year suspension and a downgrade to a lower-level

position, i.e., not the suspension and removal requested by the petitioner. Both parties petitioned for review.

**Holding: The presiding ALJ properly determined that the petitioner proved its charges.**

1. The Board explained that the respondent only challenged the presiding ALJ's determination regarding the second and third charges, i.e., failure to follow directives and conduct unbecoming an ALJ; thus, it would focus its analysis accordingly.
2. Regarding the failure to follow directives charge, the Board found unavailing the respondent's contention that two of the directives were improper for various reasons unrelated to his decisional independence, reasoning that the respondent's arguments were conclusory, unsupported, or otherwise unpersuasive.
3. Regarding the conduct unbecoming charge, the Board found unavailing the respondent's argument that his conduct, which involved various outbursts that occurred over the course of 5 days, was the product of instigation. The Board reasoned that the respondent's argument in this regard was cursory and unsupported by any references to evidence of record.

**Holding: The respondent failed to prove his affirmative defenses of age discrimination, discrimination based on religion, and equal employment opportunity (EEO) reprisal.**

1. The Board reasoned that the respondent's arguments regarding discrimination and EEO reprisal contained limited references to the record such that the arguments primarily relied on conclusory assertions.
2. The Board found that, taken together, the respondent's allegations did not prove that discrimination or retaliation was a motivating factor in the petitioner's actions.

**Holding: The respondent failed to prove his claim of a Constitutional violation.**

1. The Board recounted the respondent's claim that, when the petitioner placed him on administrative leave and issued the complaint seeking to remove him, neither the Chief ALJ that signed the complaint nor the Acting Commissioner, who had delegated the authority to take these actions to the Chief ALJ, was properly appointed; thus, no one within his reporting structure had the authority to remove him.

2. By way of background, the Board explained that, in *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018), the U.S. Supreme Court held that Securities and Exchange Commission (SEC) ALJs are inferior officers subject to the Appointments Clause of the U.S. Constitution. Because SEC staff members rather than the Commission itself appointed the SEC ALJs, the Court held that the appointment of the SEC ALJs violated the Appointments Clause. The Court further held that, because Mr. Lucia made a timely challenge to the Constitutional validity of the appointment of the ALJ who had adjudicated the SEC's claim that he had misled investors, he was entitled to relief in the form of a new hearing before a different, properly appointed official.
3. The Board further explained that, soon after the issuance of *Lucia*, the President issued an executive order, which provided that "at least some—and perhaps all—ALJs are 'Officers of the United States' and thus subject to the Constitution's Appointments Clause." Exec. Order No. 13,843, 83 Fed. Reg. 32755 (July 10, 2018). Around this same time, the Acting Commissioner of the Social Security Administration ratified the appointments of the agency's ALJs to address any Appointments Clause questions.
4. The Board indicated that, in cases that followed, including the instant proceeding, the agency petitioner did not contest arguments that its ALJs are inferior officers who were not properly appointed before the petitioner's post-*Lucia* ratification of its ALJs.
5. The Board reasoned that 5 U.S.C. § 7521, which governs this proceeding, provides that a removal "may be taken against an [ALJ] . . . by the [petitioner] in which the [ALJ] is employed only for good cause established and determined by the [Board]." The Board also explained that the applicable regulatory provision, 5 C.F.R. § 1201.140(b), provides that a Board decision finding good cause "on a proposed [petitioner] action . . . against an [ALJ] will authorize the [petitioner] to take a disciplinary action." Accordingly, when the Board makes a good cause determination, it authorizes, but does not require, the petitioner to act.
6. The Board indicated that, even if the respondent were correct in arguing that he is an inferior officer and can only be removed by a principal officer, that may very well be what happens after the Board issues this decision. The Board explained that, for this reason, it could not determine that someone other than a principal officer improperly removed the respondent.
7. Stated another way, the Board's finding of good cause in the instant proceeding merely authorizes the petitioner to remove the respondent; it does not bind the petitioner to do so. Accordingly, the Board found it unnecessary to opine on which agency official may exercise removal

authority once the Board has found good cause.

8. The Board stated that, to the extent any prior Board decisions have suggested that the Board takes, or directs an employing agency to take, an action against an ALJ under 5 U.S.C. § 7521, such decisions were overruled.

**Holding: Good cause exists for the petitioner's chosen penalty of removal.**

1. The Board explained that, in original jurisdiction cases such as this one, it looks to the factors articulated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), to guide its penalty analysis; accordingly, the Board considered the parties' penalty-related arguments under this rubric.
2. The Board first considered the severity of the respondent's conduct and its relationship to his position and duties, finding that the respondent's offenses were serious and that none of his arguments or alleged facts meaningfully lessened the severity of his offenses.
3. The Board noted that one of the *Douglas* factors is the potential for an employee's rehabilitation. The Board agreed with the petitioner's contention that it was inconsistent for the presiding ALJ to decide that the respondent was not likely capable of rehabilitation because he had shown little or no remorse, yet find that a penalty less than removal would deter the respondent in the future. The Board concluded that the petitioner had shown a lack of remorse suggesting very little potential for his rehabilitation if given a penalty less than removal.
4. The Board found that the presiding ALJ erred in analyzing the respondent's past disciplinary record and past work record. To this end, the Board found that the ALJ erred by indicating that the respondent had no history of discipline when he had previously received a reprimand that was relevant to the charges before the Board. The Board also found that the presiding ALJ erroneously determined that the respondent's past work record supported a lesser penalty because, inter alia, the respondent's unbecoming conduct occurred over a short period of time; the Board explained that these considerations are more appropriately analyzed when weighing the nature and severity of the respondent's offenses. The Board also noted that the presiding ALJ accounted for the respondent's 12 years of service as an ALJ when analyzing his past work record; however, the record reflected that the respondent had approximately 19 total years of Federal service predating the petitioner's complaint. Accordingly, the Board considered the entirety of the respondent's Federal service, not just his service in his current position, as a mitigating factor.
5. The Board agreed with the petitioner's contention that the presiding

ALJ improperly viewed the respondent's mental impairment as a mitigating factor, when the sole evidence in the record regarding the respondent's mental health was his own testimony indicating that he was free of any mental impairment.

6. The Board recognized that the respondent worked for the petitioner for many years, most of which were seemingly successful and without incidents like those at issue in this matter. The Board also credited the presiding ALJ's determination that the respondent genuinely felt mistreated during his final years of work and was experiencing other personal stressors. However, the Board found that these factors did not outweigh those that support the respondent's removal, particularly the nature of the offenses and their impact on the petitioner, as well as the respondent's lack of rehabilitative potential.
7. The Board concluded that the petitioner's choice of removal was an appropriate penalty and that the petitioner had not demonstrated good cause for a "time-served" or retroactive suspension for the period between its complaint and the Board's decision.

**Holding: The presiding ALJ did not abuse his discretion by denying the respondent's request for dismissal as a sanction for an alleged discovery violation.**

1. The Board explained that, in adjudicating original jurisdiction cases, including cases involving ALJ removals, the Board generally applies the same procedural regulations as in those falling under its appellate jurisdiction. Accordingly, the Board applied the abuse of discretion standard to its review of the presiding ALJ's determination that sanctions were unwarranted for an alleged discovery violation committed by the petitioner.
2. The Board reasoned that the respondent had presented little more than bare assertions regarding the alleged discovery violation and the propriety of dismissal as a sanction. For example, the respondent's petition for review did not direct the Board to where in the voluminous record the discovery request at issue or the petitioner's alleged deficient response thereto could be located.
3. The Board also reasoned that the respondent had not presented a persuasive explanation about the relevance of the documents at issue or how he was prejudiced by his delayed receipt of the documents.
4. Accordingly, the Board concluded that the respondent failed to show that the presiding ALJ abused his discretion by considering the alleged discovery violation and finding that it did not warrant dismissal of this case or any other sanctions. The Board explained that, in light of this finding, it need not address the presiding ALJ's suggestion that dismissal

is never an appropriate sanction for a discovery violation or the respondent's argument to the contrary.

## COURT DECISIONS

### NONPRECEDENTIAL:

*Edwards v. Merit Systems Protection Board*, No. [2022-1967](#) (Fed. Cir. July 7, 2023) (DC-1221-16-0227-W-1) The court affirmed the Board's decision dismissing Mr. Edwards's individual right of action (IRA) appeal for lack of jurisdiction. The court agreed with the Board's determination that Mr. Edwards's informal equal employment opportunity (EEO) complaint falls under 5 U.S.C. § 2302(b)(9)(A)(ii), reasoning that its prior decisions in *Young v. Merit Systems Protection Board*, 961 F.3d 1323 (Fed. Cir. 2020), and *Spruill v. Merit Systems Protection Board*, 978 F.2d 679 (Fed. Cir. 1992), which both involved formal EEO complaints, were dispositive on the issue. The court explained that it is the exercise of a Title VII right, and not the form of a complaint, that "pushes a case into the realm of § 2302(b)(9)(A)(ii) and thus deprives the Board of IRA jurisdiction." The court found unavailing Mr. Edwards's contention that his verbal complaints to his supervisors, which were of the same substance as his EEO complaint, fall under 5 U.S.C. § 2302(b)(8). The court explained that employees cannot have simultaneous Board and Equal Employment Opportunity Commission (EEOC) jurisdiction to resolve the same alleged violations. Last, the court rejected Mr. Edwards's contention that the court's decision in *Smolinski v. Merit Systems Protection Board*, 23 F.4th 1345 (Fed. Cir. 2022), permitted duplicate proceedings before the Board and the EEOC, explaining that *Smolinski* did not involve the exercise of a Title VII right.

*Pettus v. Department of the Navy*, No. [2022-1880](#) (Fed. Cir. July 13, 2023) (DC-0353-13-0409-B-1, DC-0752-16-0763-I-1) The court affirmed the Board's decision, which joined Ms. Pettus's two appeals pursuant to 5 C.F.R. § 1201.36(b) and (1) granted backpay in her restoration appeal and (2) dismissed her constructive suspension appeal because it was subsumed by her restoration appeal. The court found unavailing Ms. Pettus's argument that she was entitled to retroactive restoration to a Program Support Assistant position that she had initially requested following her compensable injury. In so finding, the court explained that Ms. Pettus had been removed for cause from the Security Assistant position to which she was ultimately restored, and that an employee removed for cause, rather than for reasons substantially related to her compensable injury, is not entitled to restoration. The court found that

the Board had erred in relying solely on the initial decision as evidence supporting a finding that Ms. Pettus's removal was substantially unrelated to her compensable injury. The court, however, concluded that this error was harmless because Ms. Pettus, who had the burden of showing that correcting the Board's error would likely yield a different result, failed to present any evidence that her removal was related to her compensable injury. The court thereafter agreed with the Board's determination that the administrative judge did not abuse her discretion in granting the agency an extension of time to respond to certain matters. The court also determined that Ms. Pettus had not provided a basis to disturb the Board's conclusion that her restoration appeal subsumed her constructive suspension appeal because it was based on the same time period. Last, the court found that it could not consider Ms. Pettus's challenge to the administrative judge's dismissal of her disability discrimination claim as a sanction for her repeated failures to comply with the administrative judge's orders. The court explained that, by choosing to abandon her disability discrimination claim for jurisdictional purposes, Ms. Pettus had abandoned not only the merits of her disability discrimination claim but also any related procedural arguments.

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